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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

TRANSCON LINES, INC.,

Petitioner,

vs.

JOSEPH SCHLITZ BREWING CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether or not this Court's holding in *Missouri & Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134 (1964), is still controlling precedent and thus whether a shipper's *prima facie* liability case against a common carrier requires that the shipper show *first* that it tendered freight to the carrier in good condition and *second* that the carrier tendered back the freight in a different and worse condition.

2.

Whether the condition complained of by a shipper against a carrier must be a measurable, corporeal, *physical* condition or whether incorporeal, non-physical attributes of the freight can create carrier liability.

3.

Whether an undisputed episode of carrier negligence which was found by the trial court to be unrelated to any harm complained of can prevent a common carrier from sustaining *its* burden of proof (assuming that a *prima facie* case has been made out) to show that the injury to the goods was occasioned by one of the common law exceptions to carrier liability and that the carrier was itself free of causal negligence.

4.

Whether this Court ought to reexamine its holding in *Elmore & Stahl, supra*, and require that a shipper prove

itself free of negligence where, as here, the agency of harm to the goods is a matter largely or entirely under the control of the shipper.

5.

Whether the Seventh Circuit has misapplied the standard of review recently articulated by this Court in *Anderson v. City of Bessemer City, North Carolina*, ___ U.S.___ , 53 U.S.L.W. 4314 (March 19, 1985).

6.

Whether, even if the Seventh Circuit's decision ought to be upheld, certiorari should be granted and the matter remanded to the Seventh Circuit for clarification.

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* All of the parties to this proceeding are listed in the caption of this case.

OPINIONS BELOW

The trial court decision by the United States District Court for the Eastern District of Wisconsin, which was in favor of Petitioner Transcon Lines, was officially reported at 571 F.Supp. 52 (E.D.Wis. 1983). That opinion is reproduced in Appendix B to this Petition. The Seventh Circuit Court of Appeal Opinion that reversed the trial court was officially reported at 757 F.2d 171 (7th Cir. 1985). A copy of the Seventh Circuit's Opinion is reproduced as Appendix A. The order of the Seventh Circuit denying petitioner's Petition for Rehearing is reproduced as Appendix C.

STATEMENT OF JURISDICTIONAL GROUNDS

The Seventh Circuit's opinion was filed and entered on March 20, 1985. A Petition for Rehearing was filed by petitioner on April 3, 1985. The Petition for Rehearing was denied by the Seventh Circuit on May 8, 1985. This Petition is timely filed and this Court has jurisdiction to review the Judgment of the Seventh Circuit under 28 USC § 1254(1).

STATUTES INVOLVED

The following statutes and Federal Rules are involved in this matter:

STATUTES: 28 USC § 1254(1); 49 USC § 20(11) (now repealed and recodified); 49 USC § 11707.

FEDERAL RULES: Federal Rules of Civil Procedure, Rule 52(a).

The pertinent text of each statute and rule is set forth in Appendix D.

STATEMENT OF THE CASE - INTRODUCTION

This case involves a claim for cargo damage by a shipper against a common carrier operating in interstate commerce.[1] The carrier, petitioner herein [hereinafter "Transcon"] prevailed at trial on the main claim of the shipper [hereinafter "Schlitz"]. In reversing, the Seventh Circuit put itself in conflict with this Court's controlling precedent in *Elmore & Stahl, supra*, and with cases decided by the Court of Appeals of each Circuit[2] save the Eleventh Circuit. While there are no decisions on point by the Eleventh Circuit Court of Appeals, the single trial court case which has been published since the formation of the new circuit is also contrary to the holding of the Seventh Circuit herein. As a consequence, the common carrier

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[1] As such, the case is to be decided under the Carmack Amendment to the Interstate Commerce Act, 49 USC § 11707 (formerly § 20(11) of the Interstate Commerce Act). Original jurisdiction was in the District Court pursuant to 28 USC § 1337 because the claims of the plaintiff arise under an Act of Congress Regulating Commerce. Plaintiff's complaint is found in Appendix E.

[2] This conflict extends to prior Seventh Circuit authority as well. *D.P. Apparel Corp. v. Roadway Exp. Inc.*, 736 F.2d 1 (1st Cir. 1984); *Gordon H. Mooney Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir. 1980); *Blue Bird Food Products v. B & O RR Co.*, 492 F.2d 1329 (3rd Cir. 1974); *Masonite Corporation v. Norfolk & Western Ry. Co.*, 601 F.2d 724 (4th Cir. 1979); *Arnold J. Rodin, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 477 F.2d 682 (5th Cir. 1973); *Plough, Inc. v. Mason and Dixon Lines*, 630 F.2d 468 (6th Cir. 1980); *Martin Imports v. Courier-Newsom Express, Inc.*, 580 F.2d 240 (7th Cir. 1978); *Pillsbury Co. v. Illinois Cent. Gulf R.R.*, 687 F.2d 241 (8th Cir. 1982); *Thousand Springs Trout Farms v. IML Freight, Inc.*, 558 F.2d 539 (9th Cir. 1977); *L. E. Whitlock Truck Service v. Regal Drilling Co.,ro 333 F.2d 488 (10th Cir. 1964); Maggard Truck Line, Inc. v. Deaton, Inc.*, 573 F.Supp. 1388 (N.D.Ga. [11th Cir.] 1983); *Ed Miniat, Inc. v. B & O R.R. Co.*, 587 F.2d 1277 (D.C. Cir. 1978).

aspects of this case are ripe for consideration by this Court on certiorari under this Court's Rule 17.1(a) and (c).

The Seventh Circuit has also put itself in conflict with this Court's controlling precedent in another area. This Court's recent holding in *City of Bessemer City, supra,* was completely disregarded by the Seventh Circuit. The Circuit reweighed evidence and made new findings even though the trial court's findings were not found to be clearly erroneous. In the process, the Circuit has misapplied the standard of review articulated by this Court and by FRCP Rule 52(a).

STATEMENT OF THE CASE - FACTS

In May of 1977, plaintiff/respondent Schlitz shipped three million empty beer cans from Memphis, Tennessee to Los Angeles, California. The cans were originally needed in Los Angeles because Schlitz' Los Angeles can making facility was on strike. The strike was over by the time the cans were delivered. The cans were shipped via the lines of defendant/petitioner Transcon. When the goods arrived in Los Angeles, the cans were found to be suffering from two discrete types of physical defects: (1) A relatively small number of cans had suffered traumatic injury (dents, abrasions, etc.); and (2) an unspecified number of cans contained chipboard fiber (packaging) dust inside of them. The trial court found that the chipboard fibers came from Schlitz' own packaging materials.

With regard to the cans which were traumatically injured, Transcon was found to be liable and $3,000.00 in damages were assessed.[3] No part of this Petition for Certiorari concerns itself with traumatic injury to the cans.

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[3] As distinct from the approximately $250,000.00 claimed by Schlitz for the contaminated cans.

With respect to the cans that were contaminated with packaging dust, Transcon was found not to be liable. The ultimate finding of Transcon's non-liability proceeded as follows: *First*, the Court found that Schlitz made out a *prima facie* case against Transcon by showing that it delivered the cans to Transcon in good "non-packaging dust contaminated" condition in Memphis and Transcon gave back to Schlitz cans that were in fact contaminated with packaging dust in Los Angeles. *Second*, Transcon then met its burden of proof under *Elmore & Stahl*, by showing (a) that the contaminant was Schlitz' own packaging material and (b) that the contaminant's presence in the cans was the result of normal, over the road vibration and not a result of carrier negligence. The trial court cut right to the heart of the matter with the following analysis:

> "Once the plaintiff/shipper makes out its *prima facie* case, the carrier's defenses are limited . . . The burden of proof is then on the carrier to show both that the carrier was free from negligence and that the damage to the cargo was due to one of the excepted causes listed above. The carrier has failed to meet its burden with respect to the $3,000.00 in [traumatically] damaged cans[4] but . . . the carrier has met its burden with respect to the fiber dust contamination."
>
> "Transcon cannot be held liable for the fiber dust contamination. On such a long journey, the

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[4] In the Court's view "the risk that the cans might fall off of the pallets [and suffer traumatic injury] should have been apparent to Transcon at the time they picked up the loads [because of the patently improper packaging]. It certainly became apparent to Transcon when they transferred the pallets to pup trailers, since at that time the Transcon employees noticed cans falling off of the pallets and so they recoopered a number of pallets. Because the packaging defects were patent, Transcon remains liable under the Carmack Amendment for [traumatic] damage to the cans."

manner in which the cans were packaged on the pallets made a certain amount of fiber dust contamination inevitable. Schlitz chose to use chipboard to separate the layers of cans, not Transcon. The manner of packaging the cans, i.e. palletizing them with chipboard separators, was under Schlitz' exclusive control. Additionally, Schlitz knew that fiber dust was generated during such shipments, although they were not concerned about contamination of empty containers because rinsing had always been adequate to remove any contamination."

"Transcon had no reason to know of the potential contamination problem. The defect in the packaging that resulted in the contamination was latent, not patent. . . . Because the fiber dust would have been generated even if Transcon never transferred the pallets to pup trailers, any negligence in reloading the pallets onto the pup trailers was not the proximate cause of the fiber dust contamination."

". . .The Court holds that the defendant has met its burden of showing that the damage resulted from the inherent nature of the goods as packaged by the shipper. Except for providing the normal vibrations that result from transportation, Transcon had no control over any of the factors that might have played a role in the contamination problem. Schlitz did [have such control] in that it placed chipboards over the open sharp end of its cans. To meet its burden of proof, it is not necessary that the defendant prove the exact reason why the chipboard fibers could not be removed from the cans. It is sufficient that the defendant show that the various factors which possibly contributed to the problem were within

> the control and exclusive knowledge of the shipper." 571 F.Supp. at 57-58.

Schlitz appealed the trial court's judgment to the Seventh Circuit. Because the facts exonerated Transcon, Schlitz importuned the Seventh Circuit to create a new rule of law, i.e. that in addition to the defensive requirements established by *Elmore & Stahl*, the carrier must meet the additional burden of going forward and explaining why the damage, albeit not occasioned by any act or omission on its part, cannot be repaired. The Seventh Circuit agreed and reversed. While it is difficult to coherently paraphrase the Seventh Circuit's holding, it was explicitly in agreement with Schlitz that a carrier has a greater burden than that articulated in *Elmore & Stahl*.

As will be noted in the argument section, the Seventh Circuit's decision can be read as containing two holdings, both of which are contrary to this Court's precedent: First, it says that the adhesion of the fiber dust to the cans (as distinct from the mere presence of dust), which was not attributable to any measurable physical change in the cans, is sufficient to impart carrier liability if the carrier cannot explain away this incorporeal phenomenon. This is in conflict with the *Elmore & Stahl*, case which requires that there be a measurable physical difference in the goods when comparing their condition upon tender to the carrier and their delivery back from the carrier. Second, the holding squarely omits the requirement that the *prima facie* case contain a showing that the complained of defect (in this case an incorporeal one) be absent prior to shipment ("good condition") and extant after the shipment ("bad condition").

The Seventh Circuit also appears to have adopted a "brooding omnipresence" theory of negligence. Notwithstanding that the trial court specifically found that there was no causal relationship between any Transcon negligence on the one hand and the fiber contamination on

the other hand, the Seventh Circuit adopted a fact-finding role and found otherwise: ". . . There was substantial evidence of negligent conduct on the part of the defendant: the direct disobedience of an instruction from the shipper, the unnecessary unloading and reloading, the lack of bracing of the cargo, and the inclusion of additional cargo. . . ." 757 F.2d at 174.

The Seventh Circuit's decision was filed on March 20, 1985. A Petition for Rehearing was filed by Transcon on April 3, 1985. The Petition for Rehearing was denied on May 8, 1985. This Petition for certiorari has ensued.

ARGUMENT

I.

COMMON CARRIER ISSUES

A. THE SEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S HOLDING IN *MISSOURI & PACIFIC RAILROAD V. ELMORE & STAHL.* HEREIN OF "GOOD CONDITION" VERSUS "BAD CONDITION".

Some twenty-one years ago, this Court set out the requirements for a plaintiff's *prima facie* case under the Carmack Amendment. *Elmore & Stahl,* holds that the plaintiff must prove that the freight was in good condition when tendered to the carrier and that it was in a different and worse condition when it was tendered back from the carrier. Thereafter, the burden shifts to the defendant carrier to demonstrate that it was free of negligence and that the damage was caused by (a) an act of God; (b) a public enemy; (c) an act of the shipper; (d) a public

authority; or (e) the inherent vice or nature of the goods. In the case at bar, the trial court correctly found that Schlitz made out a *prima facie* case by proving that (a) the cans when tendered to Transcon were not contaminated with fiber dust, and (b) when the cans were delivered back from Transcon they contained fiber dust. Graphically, Schlitz' *prima facie* case could be described as follows:

Tender to Carrier	**Delivery from Carrier**
GOOD CONDITION (beer cans free of chipboard fiber contamination)	BAD CONDITION (beer cans had chipboard fiber contamination)

Thereafter, according to the trial court, Transcon went forward with its burden of proof and showed that normal and unavoidable transit vibration, acting upon the shipper's own packing materials, produced fiber dust in the cans. Moreover, the court found that there was no causal relationship between any negligence that Transcon might have visited upon the cans and the presence of dust within those cans.

The Seventh Circuit performed an interesting bit of surgery on the trial court's findings. It found that the true problem in this case was not that the cans had been *contaminated* by fiber dust but rather that the cans *retained* fiber dust, i.e. could not be cleansed of the accumulation of fiber contamination which occurred during an 1,800 mile motor carrier trip. [5] As we note in the next section, there was no evidence of a measurable physical reason why the fiber dust adhered to the cans, e.g. there was no testimony that the cans, upon delivery from Transcon in Los Angeles, contained fiber dust - plus - road grime or fiber dust - plus - diesel smoke. Assuming that dust retention rather than the mere presence of the dust is the *causus belli* (i.e. that the

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[5] There was no finding that there was any road grime or any other binding substance in the cans other than the chipboard fiber itself.

cans were not "rinseable" after an 1,800 mile accumulation of dust incident to motor transportation), then Schlitz' *prima facie* case would, according to *Elmore & Stahl*, have to be outlined as follows:

Tender to Carrier	**Delivery from Carrier**
GOOD CONDITION (1,800 mile rinseable)	BAD CONDITION (not 1,800 mile rinseable) [6]

The problem with the Seventh Circuit analysis is that (whether by design or by confusion) it plainly ignores that Schlitz, in order to prevail, would have to prove that the cans were 1,800-mile-rinseable when tendered to Transcon in Memphis. In simple words, in order to make out an *Elmore & Stahl prima facie* case, it would be necessary for Schlitz to show that its cans were so configured that they could be purged, utilizing Schlitz' ordinary rinsing processes, of an accumulation of dust incident to an 1,800 mile motor truck trip. No such finding was made by the trial court. Indeed, the trial court looked at this issue, attempted to glean some evidence by examining Schlitz' witnesses, and came up empty handed:

> "Q. [By Schlitz' counsel] How would you compare the percentage of can fall-off —
>
> [The Court] Its chipboard [dust] that we are interested in! We don't care about the fall-off. That's $3,000.00. *Chipboard [dust] on shipments by motor carrier for 1,800 miles* [emphasis added]. Have there been any other shipments of 1,800 miles * * * I'll ask him! * * * Are there any other shipments that you know of by truck that came to you from long distances, 1,000 miles or more, of empty cans?

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[6] We defer to the next section the problem of whether or not the absence of any measurable physical differentiation in either the cans or their ambient environment permits of recovery on the part of a shipper.

A. I can't recall.

[The Court] All right."

Thus frustrated, the trier of fact was clearly not persuaded that Schlitz had established that its cans were possessed of a quality that made them "rinseable" after an 1,800 mile motor carrier trip.

The trial court, to its extreme credit, never confused or muddled the phenomena which touch and affect this case. It segregated in its own mind the difference between the physical presence of chipboard dust on the one hand and the unexplained inability of Schlitz to wash the fiber dust from the cans after an 1,800 mile motor carrier trip, i.e. the rinseability problem. The Seventh Circuit, alas, was confused and did muddle exactly that which the trial court had left clear. A single sentence contained in the Seventh Circuit's decision shows that it did not differentiate between the physical presence of dust and Schlitz' inability to rinse the dust out:

> ". . . Furthermore, it is difficult to accept the conclusion that Transcon had no control over the factors relating to the *fiber contamination* when the cause of the *fiber adhesion* was never determined." 757 F.2d at 174.

This is a classic example of mixing apples with oranges. The failure of the Seventh Circuit to discriminate between fiber dust contamination on the one hand and fiber adhesion on the other hand caused it to reverse even though there was no finding at the trial court level (nor could there be) that Schlitz had proved the first leg of the *prima facie* case. In simple words, if the problem is dust adhesion, then Schlitz failed to prove its *prima facie* case because it did not prove to the satisfaction of the trial court that the cans when tendered to Transcon were so configured that they could be purged of an 1,800 mile accumulation of fiber dust. The Seventh Circuit has reversed on the apparent basis that the shipper's proving a *prima facie* case as to one phenomenon

(fiber dust contamination) relieves it from proving a *prima facie* case as to *another* phenomenon (dust retention). This view of the law is simply not supported by the controlling precedent emanating from this Court nor from the cases decided in each of the other Circuits.

B. THE SEVENTH CIRCUIT DECISION IN THIS CASE IS IN CONFLICT WITH *MISSOURI & PACIFIC RAILROAD V. ELMORE & STAHL* ON A SECOND GROUND. HEREIN OF PHYSICAL VERSUS METAPHYSICAL.

A brief recitation of this Court's holding in *Elmore & Stahl*, is in order. ". . . Under Federal law, in an action to recover from a carrier for *damage* to a shipment, the shipper establishes his *prima facie* case when he shows delivery in good condition [and] arrival in damaged condition. . . . " The juxtaposition of the words "damage" and "condition" denote that this Court believes that a damage case (as distinct from one involving loss of goods or delay) is actionable because the freight, at some point in the transportation episode, has undergone a corporeal, tangible, and measurable *physical* transformation for the worse. In the case of Schlitz, it handed over cans to Transcon which had no dust in them and it received cans back that had dust in them. It thus made out a *prima facie* case. In the case of *Elmore & Stahl*, the shipper handed over melons which were not rotted and got back melons that were rotted and thus made out a *prima facie* case. After diligent search, counsel for petitioner herein can find absolutely no case, *none*, which stands for the proposition that a shipper can recover for "damage" to freight when the thing about which he complains cannot be described or measured in a physical sense.

With regard to measurable, physical phenomena Schlitz had no difficulty making one *prima facie* case: The cans had no dust in them in Memphis and had quite a bit of dust in them when they were redelivered in Los Angeles. That showing, as noted above, put the burden on Transcon to go forward on its defensive issues. That burden was met. Schlitz complained, in addition to the threshold problem of dust contamination, that the dust could not be washed out of the cans using its ordinary washing regimen. Schlitz took the position that it does not have any burden to show that the non-rinseability of the cans has a measurable, physical aspect to it other than the mere presence of dust. In paraphrase, Schlitz' position is that "even if Transcon can successfully meet its burden of proof with respect to the presence of dust in the cans in Los Angeles, Schlitz should nevertheless prevail because the dust, mysteriously, cannot be rinsed out and Schlitz has no burden to show that there was some physical change to the cans involved in the dust retention phenomenon."

Anomalous results would follow if the paraphrase quoted above were reflective of the law. Indeed, the legal dialogue which inheres in Schlitz' unstated major premise would be ludicrous. A shipper would be able to make out a *prima facie* case by simply showing that there was some mysterious quality to the goods which it received that it did not like.

A hypothetical may be of some value here. Suppose that a shipper tenders a consignment of shirts to a carrier for interstate transportation. Quite accidentally, the shipper's shipping clerk leaves his marking pen inside one of the boxes of the shirts. During transportation the pen works its way open and a number of the shirts are stained with ink. The state of the law, for better or for worse, is that the shipper can make out a *prima facie* case by showing that the shirts were unstained when they were handed over to the carrier and that they were in a stained condition when

handed back from the carrier. The burden would then shift to the carrier to show a common law defense, e.g. fault or default of the shipper *and* that it was free of causal negligence. Presumably, the carrier would go forward and show that it was the shipper's employee who left the pen in the shirt box (thus showing fault or default of the shipper) and that the shipper had complete control over whether or not a pen was put in the box with the shirts (thus permitting an inference that the carrier acted without causal negligence). Our hypothetical shipper might then complain that his problem is not really ink all over the shirts but rather that the ink couldn't be washed out of the shirts. The shipper might well also aver that "I have received inky shirts before, I've always been able to wash them out." [7] Then let us suppose that no one could demonstrate at trial why the ink couldn't be washed out of the shirts. If Judge Reynolds were sitting as the trial judge, he would hold that

> "To meet its burden of proof, it is not necessary that the carrier prove the exact reason why the ink stains could not be removed from the shirts. It is sufficient that the defendant show that the various factors which possibly contributed to the problem were within the exclusive control of the shipper." e.g. 571 F.Supp. at 57-58.

The Seventh Circuit would obviously reverse:

> "Appellant [the shipper] claims that the trial judge erred in concluding that the carrier had satisfied its burden of demonstrating that it was not negligent and that the fault or default of the shipper was the sole cause of the damage. We must agree."

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[7] "I've always been able to fix it before" is standard plaintiffs' litany in cargo damage cases.

> "We begin by noting that it is undisputed that the shipper satisfactorily presented a *prima facie* case. That showing created a presumption of negligence as to the carrier. The trial court stated: 'Except for providing the normal rigors of inland transport, the carrier had no control over any of the factors that might have played a role in the ink staining problem.' It is difficult to accept the conclusion that the carrier had no control over the factors relating to the *ink staining* when the cause of the *ink retention* was never determined."
>
> "We are further reinforced in our belief that the carrier should be liable because none of the experts who testified could recall an ink retention problem ever occurring before to the shipper. The carrier has, therefore, failed in its burden of proof to show that it is free of negligence and that the sole efficient cause of the ink staining was the fault or default of the shipper." e.g. 757 F.2d at 174-175.

There is much the matter with the hypothetical analysis just concluded. As relevant to this section, the "mysterious" problem of Schlitz (in not being able to wash out its cans) or the hypothetical shipper (in not being able to wash the ink out of its shirts) simply do not fit within the ambit of carrier liability outlined in *Elmore & Stahl.* Unless a shipper can point out some ponderable, measurable, and physical difference in the condition of the goods between the time they are tendered to the carrier and the time they are delivered back, *Elmore & Stahl,* simply does not call for liability.

All that the facts show and all that the findings declare is that Schlitz' ordinary rinsing regimen was unequal to the task of washing out that amount of dust which

accumulated after an 1,800 mile motor carrier trip.[8] There was no finding that such an accumulation could not be removed by using a better or improved washing technique. Schlitz pointed to no ponderable, physical differentiation in the condition of the cans (other than the accumulation of dust itself) between the time they were tendered to Transcon in Memphis and the time they were delivered in Los Angeles. This inability to point to a measurable, physical defect rather than a conclusionary problem ("we can't wash them out") keeps Schlitz from proving a *prima facie* case under *Elmore & Stahl.* It is perhaps necessary for this Court to make painfully obvious that which should already be sufficiently clear: A carrier operating in interstate commerce is liable, only for measurable, physical harm to the goods.

C. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT TRANSCON'S UNRELATED NEGLIGENCE BARRED THE CARRIER FROM PROVING THAT IT WAS FREE OF CAUSAL NEGLIGENCE.

With regard to the $3,000.00 worth of traumatic injury done to Schlitz' cans (dents, abrasions, scratches, etc.), the trial court held that Transcon should have realized that Schlitz' inadequate packaging would permit cans to fall off the pallets on which they were shipped and thereby suffer traumatic injury. Transcon did not vigorously contest at trial its liability for the $3,000.00 worth of traumatic injury. The cases are legion, and need not be repeated here, that where a carrier sees that a shipper's packaging is inadequate, his duty is to refuse to take the freight and to leave the shipper to his own devices.[9] That negligence,

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[8] Transcon's radical solution: more soap and water.

[9] A different rule might apply if a shipper tendered freight to a carrier

which led to the traumatic injury to a few cans, was *specifically* found by the trial court not to be causally related to the major harm that Schlitz complained of, i.e. the presence of fiber dust contamination in the cans. The trial court correctly held that the negligence as to which a carrier must show itself innocent must relate in some way to the harm complained of.

The Seventh Circuit feels otherwise:

> "We begin by noting that it is undisputed that Schlitz satisfactorily presented a *prima facie* case. That showing created a presumption of negligence as to Transcon [citations]. Even beyond that presumption there was substantial evidence of negligent conduct on the part of the defendant: The direct disobedience of an instruction from the shipper, the unnecessary unloading and reloading, the lack of bracing of the cargo, and the inclusion of additional cargo."
>
> * * *
>
> "The trial court stated 'except for providing the normal vibrations that result from transportation, Transcon had no control over any of the factors that might have played a role in the contamination problem.' However, Transcon provided more than 'normal vibrations' as a result of the unnecessary unloading and reloading as well as its failure to brace the loads. . . ." 757 F.2d at 174.

The Seventh Circuit's view of the law is simply wrong. It defies both logic and this Court's prior precedent. That view

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for transportation on an emergency basis where some product attrition, given the context of the transaction, must be held to be acceptable, e.g. product moved into unaccustomed territory because of labor unrest.

apparently is that any act of negligence, even one clearly not causative of the harm complained of, makes a carrier absolutely liable to a shipper for any damage to his property. In this regard, another hypothetical is useful. Suppose that a carrier was transporting a luxury automobile on a truck commonly known as an "auto rack." Suppose further that the carrier's driver negligently edged onto a shoulder of the highway thereby causing one of the vehicle's hubcaps to hit a tree branch and become dented. According to the Seventh Circuit's view, no matter what additional harm might thereafter befall that automobile in the course of transportation, the carrier would be prohibited from proving that it was free of causal negligence. Thus, if lightning struck the car and destroyed it, the carrier would not be permitted to put on an "act of God" defense because of its prior negligence. This obviously makes no sense. Worse, it is a position that cannot be reconciled with the clear intent of this court's holding in *Elmore & Stahl.*

In discussing the interplay of negligence and strict liability at common law, this Court held as follows:

> "The general rule of carrier liability is based upon the sound premise that the carrier has particularly within its knowledge 'all the facts and circumstances upon which it may rely to relieve it of its duty. . . . In consequence the law casts upon it the burden of the [damage] which it cannot explain or, explaining, bring within the exceptional case in which it is relieved from liability. [Citation]. We are not persuaded that the carrier lacks adequate means to inform itself of the condition of goods at the time it receives them from the shipper, and it cannot be doubted that while the carrier has possession, it is the only one in a position to acquire the knowledge of *what actually damaged a shipment entrusted to its care.*" [Emphasis added.] 377 U.S. 143-144

In simple words, this court has held that the focus on a carrier's negligence is relevant if it bears upon the issue of what damaged the goods. The context of this Court's discussion of the concept of negligence in *Elmore & Stahl* simply brooks of no other interpretation. *Elmore & Stahl* does not remotely justify a "brooding omnipresence" theory of negligence whereby casually unrelated negligence would operate to bar a defense.

D. THIS COURT OUGHT TO REEXAMINE ITS HOLDING IN *ELMORE & STAHL* AND REQUIRE THAT A SHIPPER PROVE ITSELF FREE FROM NEGLIGENCE WHERE, AS HERE, THE AGENCY OF HARM TO THE GOODS IS A MATTER LARGELY OR ENTIRELY UNDER THE CONTROL OF THE SHIPPER.

The conceptual contours of this case are easy to state: Schlitz, by choosing to use chipboard fiber sheets which are inherently prone to shed dust, handed Transcon a litigation time bomb in Memphis which exploded *en route* to Los Angeles. Stated in somewhat more decorous terms, Schlitz' choice of separator sheets virtually assured that it could make out a *prima facie* case against any carrier, including Transcon, each and every time empty beer cans are transported more than a few miles.

The central premises behind the scheme of common carrier liability are historically understandable (as to strict liability) and logistically sensible (as to the requirement that a carrier prove itself free of negligence). This and similar cases, however, present a factual pattern which does not justify keeping as large a burden of proof on the carrier as is now the case. Without further ado, Transcon posits, a

suggested rule: Where a carrier is able to prove that the agency of harm to the goods was provided at the option of the shipper, then such showing should cause the burden of proof to shift to the shipper to show that *it* was free of negligence as an indispensable element of its *prima facie* case.

Why should we do this? As Justice Douglas noted in his dissent in *Elmore & Stahl*, "What we do today allows a shipper, under the guise of buying transportation service, to sell a carload of [its product] to the railroad." 377 U.S. at 151. What Justice Douglas was driving at, what counsel for Transcon suggests here, and what the trial court below also noted, was that it is fundamentally unfair for a shipper to create an unreasonable risk of harm to its own goods and *then* avail itself of a legal system which permits it to force a carrier to buy its defective goods unless the carrier can go forward with an extraordinarily rigorous burden of proof.

In his dissent, Justice Douglas noted that at the onset of the transportation episode the shipper had an opportunity to purchase varying levels of protection for its melons as they were transported by the defendant railroad. The shipper opted for something less than the full range of carrier protective services. Not surprisingly, the melons deteriorated prior to reaching their destination. The case went to a jury to whom special interrogatories were posed. The jury found that the railroad "performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions." 377 U.S. at 146. Notwithstanding that rather clean bill of health, the jury (somewhat inexplicably) refused to find that the damage to the melons was caused by "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." Judgment was entered for the plaintiff shipper. A succession of appeals

culminated in this Court's granting *certiorari* and hearing the case.

The majority opinion in *Elmore & Stahl* correctly pointed out that the Carmack Amendment codified the common law rule regarding the limited circumstances under which a carrier might exculpate itself. The court then went on to note as follows:

> "Finally, all else failing, it is argued that as a matter of public policy, the burden ought not to be placed on the carrier to explain the cause of spoilage, because where perishables are involved, the shipper is peculiarly knowledgeable about the commodities' condition at and prior to the time of shipment, and is therefore in the best position to explain the cause of the damage. Since this argument amounts to a suggestion that we now carve out an exception to an unquestioned rule of long standing upon which both shippers and carriers rely, and which is reflected in the freight rates set by the carrier, the petitioner must sustain a heavy burden of persuasion. . . ." 377 U.S. at 143-144.

The Court then went on to reject the railroad's offer to carve out an exception in less than a paragraph:

> "The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge 'all the facts and circumstances upon which it may rely to relieve it of its duty. . . . In consequence, the law casts upon it the burden of the loss which it cannot explain, or, explaining, bring within the exceptional case in which it is relieved from liability. [Citation] We are not persuaded that the carrier lacks adequate means to inform itself of the condition of goods at the time it receives them from the shipper, and it cannot be doubted that while the carrier has

> possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care. Affirmed." 377 U.S. at 143-144.

The three major building blocks of this Court's reasoning in *Elmore & Stahl* are simply missing from the present case. First, it is the shipper rather than the carrier who has "peculiarly within its knowledge all the facts and circumstances" which make the chipboard fiber separator sheets so dangerous to the shipper's own goods. Further, it is precisely the fact in this case that "the carrier lacks adequate means to inform itself of the [inherent instability of the packing materials] at the time it receives them from the shipper." Lastly, it most certainly can "be doubted that while the carrier has possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care." Schlitz rather than Transcon had the only practical means to know that the chipboard sheets had a marked tendency to slough off fiber dust. Nothing about the external appearance of the packages would communicate such knowledge to the carrier. Indeed, even tearing the packages apart and looking inside of cans at the point of origin would not have revealed to Transcon that (a) the separator sheets would shed dust and that (b) the dust couldn't be washed out. If liability turns upon a carrier's having "adequate means to inform itself of the condition of goods at the time it receives them" then that common law rationale simply does not apply to this case.

The balance of this Court's common law analysis likewise does not apply to the facts of this case. Transcon most assuredly is *not* the "only one in a position to acquire the knowledge of what actually damaged [this] shipment." Bluntly stated, it was quite fortuitous that Transcon's counsel was able to locate a former director of logistics of Schlitz who informed Transcon that Schlitz knew all along

that its choice of packaging materials caused fiber dust contamination.[10] To suggest that interstate commerce should be burdened with a carrier's affirmative duty to make sophisticated inquiries and judgments about the shipper's own packaging materials invites disrespect for ordinary reason. A carrier should simply not be required to make inquiries or judgments about anything other than the patent appearance of a package. More to the point, a carrier lacks the ability as a practical matter to inform itself of the peculiarities of each and every possibility for packing the various handiworks of man. It should be left up to the manufacturer or grower or distributor of goods to inform itself about those things which are particularly and peculiarly dangerous to the commodity shipped. Where, as here, a shipper has made a choice of packing materials which is itself the agency of the harm done to the goods, then it should be upon the *shipper* to prove itself free of negligence in order to make out a *prima facie* case against the carrier. Simple justice requires no less. [11]

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[10] "Finally the court finds that Schlitz knew that shipments of materials with chipboard or cardboard separators generated fiber dust contamination. Schlitz hired [defendant's expert] to investigate what could be done to eliminate fiber dust contamination of its final product, and his research indicated that fiber dust is always generated by shipping materials with chipboard or cardboard separators." 571 F.Supp. at 56.

[11] An alternative is also suggested: In view of the virtual demise of the contributory negligence defense in favor of comparative negligence in a majority of the states, a fair way to allocate damage in shipper fault cases is on a comparative basis. Courts and juries are now uniformly familiar with this concept. The specter of "defendant takes all" which inhered in the contributory negligence defense — and which inspired the harsh rule against carriers — is no longer with us. The reason being gone, the rule should go also. The court may wish to invite briefing on this point.

II.

JUDICIAL ADMINISTRATION ISSUES

A. THE SEVENTH CIRCUIT HAS MISAPPLIED THE STANDARD OF REVIEW APPLICABLE IN CASES OF THIS KIND IN DEROGATION OF THE FEDERAL RULES AND THIS COURT'S RECENT HOLDING IN *ANDERSON V. CITY OF BESSEMER CITY, NORTH CAROLINA.*

Rule 52(a) of the Federal Rules of Civil Procedure, provides the applicable standard of review with respect to the findings of fact of a trial court and declares as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Within the last four months, this Court has clarified the "clearly erroneous" standard of review in *Anderson v. City of Bessemer, supra,* Case No. 83-1623; __U.S__, 53 U.S.L.W. 4314 (March 19, 1985), and has enunciated strict guidelines to be followed by the appellate courts. This Court admonished that "if the District Court's account of the evidence is plausible in light of the record, the Court of Appeal may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. . . . This is so even when the District Court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 53 U.S.L.W. at 4317.

The Seventh Circuit's actions are in direct conflict with the holding of this Court. The most fundamental error that the Seventh Circuit made was that it substituted its own

findings on the issue of carrier negligence for those of the trial court. Specifically, the trial court emphatically found that an undisputed episode of carrier negligence was *not* causily related to the harm complained of. The trial court spoke in the following way:

> "Transcon had no reason to know of the potential contamination problem. The defect in the packaging that resulted in the contamination was latent, not patent. . . . The fiber contamination was generated by normal vibrations encountered through transportation, and Transcon could have done nothing to prevent the contamination. Because the fiber dust would have been generated even if Transcon never transferred the pallets to pup trailers, any negligence in reloading the pallets onto the pup trailers was not the proximate cause of the fiber dust contamination." 571 F. Supp. at 57.

The Seventh Circuit was not satisfied with this finding. Contrary to the express requirements of Rule 52(a) and this Court's recent holding in *City of Bessemer*, supra, the Seventh Circuit struck out on its own with respect to fact finding:

> ". . . There was substantial evidence of negligent conduct on the part of the defendant: The direct disobedience of an instruction from the shipper, the unnecessary unloading and reloading, the lack of bracing of the cargo, and the inclusion of additional cargo. Furthermore, there are relevant areas of inquiry to which the defendant provided no evidence. Transcon offered no testimony of any of the truck drivers as to the treatment of the cargo between West Memphis and Van Nuys. Furthermore, there was no evidence offered as to the nature of the additional cargo which was put in the rear of the trailers."

> "... Transcon provided more than 'normal vibrations' as a result of the unnecessary unloading and reloading as well as its failure to brace the loads. Furthermore, it is difficult to accept the conclusion that Transcon had no control over the factors relating to the fiber *contamination* when the cause of the fiber *adhesion* was never determined." 752 F.2d at 174.

The Seventh Circuit reweighed the evidence with regard to carrier negligence. The Seventh Circuit, based on no part of the record nor any demonstrated competence in the field of its own, opines that traumatic injury *must* have resulted in fiber contamination. Aside from being completely unsupported in the record, there is simply no basis upon which the Seventh Circuit could say that the trial court was clearly erroneous within the meaning of Rule 52(a) and this Court's holding in *City of Bessemer, supra.* A trial court is fully within its rights to disregard the plaintiff's testimony ("fiber dust caused by trauma") and accept the defendant's testimony that it is transit vibration which causes cans to abrade the chipboard which in turn causes chipboard dust to fall into the cans. Both the applicable federal rule and the decided cases are in agreement that a trial judge is peculiarly well situated to make these discrete determinations between which of two experts to believe or which of two bodies of evidence to give the most weight to. See FRCP Rule 52(a) and *City of Bessemer, supra.*

The Seventh Circuit lastly was bothered by the fact that the trial court disregarded what it apparently thinks was a comparable shipment by rail that moved between Memphis and Los Angeles. In that shipment, some ten million identical cans were transported. There was no testimony at trial regarding whether or not these cans were rinseable or

not. It is known that these cans were put in production.[12] Apparently the Seventh Circuit thinks that the fact that Schlitz put the ten million railroad cans in production must mean that they were in better condition than those delivered by Transcon. Building on that first unsupported assumption, the Seventh Circuit next must have believed that the stipulated fact that the Transcon cans contained too much fiber dust to be washed out is *irrebuttable* proof of carrier negligence. Worse, the Seventh Circuit holds by unavoidable inference that the trial court errs as a matter of law in not finding that the motor carrier is negligent if its cans are dustier than railroad cans at the end of a voyage of similar distance. Where precisely the Seventh Circuit finds evidentiary support for this is unknown to petitioner's counsel.[13]

It would appear that the unspoken major premise of the Seventh Circuit opinion is that the vibration aspects of both motor and rail shipments are identical and that the trial court only had to look for some other sort of differentiation, and if there were such differentiation, then, as a matter of law, the motor carrier was negligent:

> "[Transcon] suggests that there is insufficient evidence to justify a comparison between the two shipments. We disagree. The testimony was uncontroverted that the cans were the identical type . . . , were packed in the same manner in pallets with chipboard separators, and traveled the same distance. The only significant distinction is that the cans in the rail shipment were not

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[12] The Transcon cans which were delivered after the strike was over were not put into production.

[13] The harmonics of each mode of transport are different, i.e. the vibration factors generated by rail movement are not the same as truck or airplane or shipboard vibration. The Seventh Circuit intuits otherwise.

> subjected to unnecessary unloading and reloading and were properly braced. . . ." 752 F.2d at 175.

That kind of language flows more appropriately from the pen of a trial judge, not an appeliate panel. One can well imagine a trial judge saying: "I don't credit Transcon's vibra- tion theory; I like Schlitz' traumatic injury theory better." The problem, of course, is that the trial judge who was assigned to hear the case didn't find that way. It is not the province of any Court of Appeal to do that unless, as is contemplated by the rules, the trial court's finding is clearly erroneous. The Seventh Circuit made no such determination with regard to the trial judge's effort in this case. Indeed, it could not have done so in view of the state of the record.

One last matter requires mentioning under this rubric. In making its analysis of the presence or absence of carrier negligence, the trial court spoke to the issue of fundamental fairness suggested in another section of this brief. The trial court, isolating the negligence issue as it must do, discussed whether or not Transcon was negligent where it was Schlitz rather than Transcon that possessed knowledge of the dangers in using chipboard. The court then concluded its analysis with the following language:

> "To meet its burden of proof, it is not necessary that the defendant prove the exact reason why the chipboard fibers could not be removed from the cans. It is sufficient that the defendant show that the various factors which possibly contributed to the problem were within the control and exclusive knowledge of the shipper." [*Citing Wisconsin Electric Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697 (7th Cir. 1979)] 571 F.Supp. at 57-58.

What the Seventh Circuit did next was almost as bad as its departure from the "clearly erroneous" doctrine: It psychoanalyzed the trial judge's citation of a case in order to bolster its own foray into fact finding:

> "Our conclusion that the District Court erred in applying the burden of proof imposed on Transcon by the Carmack Amendment is buttressed by its reliance (*sic*) on *Zallea Bros., supra*. . . . [In that case] this court quoted extensively from the trial court's opinion as 'an excellent synopsis of the equities in this case. . ."
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> * * *
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> " Of course, the major distinction between *Zallea Bros.* and this case is that it was a typical civil action in which the burden of proof was on the plaintiff as to all claims. Under the Carmack Amendment, the burden was on the defendant Transcon to demonstrate that it had not been negligent and that the damage was caused by an inherent defect in the cargo." 757 F.2d at 175.

The Seventh Circuit seemed to go out of its way to misread the significance of the trial court's alluding to the *Zallea* case. The trial court was simply focusing on the negligence issue that attended the discussion of superior knowledge. It did not suggest by inference or otherwise that the burden of proof was other than upon Transcon to show itself free from negligence (which it did) nor that it was excused from showing that the instrumentality of harm was one of the five common law exceptions to liability. Parapsychology is never a good ground on which to render a decision. For a Circuit Court to do so is markedly inappropriate. More importantly, the Circuit was wrong.

B. EVEN IF THE SEVENTH CIRCUIT'S DECISION OUGHT TO BE UPHELD, CERTIORARI SHOULD BE GRANTED AND THE MATTER REMANDED TO THE SEVENTH CIRCUIT FOR CLARIFICATION.

The Seventh Circuit's published decision in this case is opaque and confusing. The author of the decision obviously disagrees with the trial court's findings of fact in a number of areas but never says that the trial court's findings were clearly erroneous. The causal nexus between the purported negligence of Transcon on the one hand and the damage actually complained of on the other hand was never drawn. The merging of the first phenomenon complained of by Schlitz (presence of dust) and the second phenomenon (dust retention) was passed off by the Seventh Circuit leaving uncertain whether or not a shipper has to prove a *prima facie* case in respect of the very phenomenon about which it complains. The decision adds nothing to the law save confusion.

Even if this Court is tempted to let that decision stand, it should order the Seventh Circuit to clarify its decision in order that the basis of decision be understandable and plain. Counsel for Transcon expresses no opinion on how this might be accomplished, although orders of this Court occasionally can work miracles.

III.

CONCLUSION

For all of the reasons stated hereinabove, this petition should be granted and the Court should require full briefs and arguments on the merits.

Respectfully submitted,

GARFIELD, TEPPER &
ASHWORTH

By: CHRISTOPHER ASHWORTH
Attorneys for Petitioner

APPENDIX A

OPINION

JOS. SCHLITZ BREWING CO.,
a Wisconsin corporation,

Plaintiff-Appellant,

vs.

TRANSCON LINES, a California corporation,

Defendant-Appellee.

No. 83-2196

United States Court of Appeals,
Seventh Circuit.

Argued May 29, 1984.
Decided March 20, 1985.

WILLIAM J. CAMPBELL, Senior District Judge.

Plaintiff, Jos. Schlitz Brewing Company, filed a complaint in district court under 49 U.S.C. § 11707, the Carmack Amendment, seeking compensation for cargo damage caused to a shipment of empty beer cans. The cans had been shipped by the defendant motor carrier, Transcon Lines, from Memphis, Tennessee to Van Nuys, California. Some of the cans were dented or crushed in transit and the defendant's liability for that portion of the cargo damage is not at issue on this appeal. [1] The remainder of the shipment

[1] A judgment in the amount of $3,000 was entered against Transcon as to that damage.

was rendered unusable due to fiber contamination and the resulting loss was valued at approximately $235,000. After a non-jury trial, the district court determined that the defendant was not liable for that damage. 571 F.Supp. 52. Schlitz challenges that conclusion, claiming that the district court erred in its allocation of the burden of proof.

The material facts as found by the district court are not in dispute. The appellant operated breweries at various locations in the country and had its own Container Division to manufacture cans and bottles. However, Schlitz did not rely solely on its own Container Division. For example, in Memphis the American Can Company operated a manufacturing plant adjacent to the Schlitz facility that supplied cans directly to the brewery. In May 1977, the employees in appellant's Container Division went on strike. The breweries were still operating, however, and Schlitz had to make arrangements to provide cans for the beer that was still being produced. The appellant contracted with the American Can Company to increase its production of cans at the Memphis facility and then made plans to transport those cans to its other breweries. Schlitz arranged with the Southern Pacific Railroad to ship 10 million steel cans, labeled "Schlitz", to Van Nuys, California. Appellant also contracted with the defendant for the shipment of 3.1 million cans, labeled "Old Milwaukee", by motor carrier to the same destination.

When shipping empty cans the industry practice is to stack them vertically with the opening at the top and to separate the layers of cans with chipboard separators. The cans are stacked on pallets, braced with bands, and wrapped in cardboard shrouds and placed in the trailer or railroad car by the use of forklifts. This method is used throughout the industry even though it is inevitable that fiber dust will

be generated as a result of the friction between the open tops of the cans and the chipboard separators. While the resulting dust is not desirable, it can be rinsed out prior to the filling of the cans and, therefore, this means of transporting cans is not impractical.

Schlitz utilized the method of packing cans described above in preparing the cargo for shipment to Van Nuys. The pallets to be sent were chosen at random from the cans produced by the American Can Company in Memphis (the other pallets were either shipped to other breweries or put into production at Memphis).

When Schlitz originally provided Transcon with the shipping instructions for its cans, it directed that 45-foot trailers with swing-out doors be utilized. Thereafter, James McNeer, manager of defendant's Memphis terminal, telephoned Ted Thurmon, inventory control coordinator at Schlitz's Memphis brewery, regarding the shipment. He asked whether 27-foot "pup" trailers could be used to ship the cans. This arrangement would be favorable to Transcon because it could transport the "pup" trailers in tandem from Arkansas to California thereby lowering its expenses. Mr. Thurmon stated, however, that the smaller trailers would be unsatisfactory. Thereafter, Mr. McNeer did in fact send twenty-four 45-foot trailers to the Memphis brewery to pick up the shipment of cans.

During the period between May 17 through May 21, 1977, approximately 3.1 million cans were loaded by Schlitz's personnel onto the trailers. The appellant had instructed its employees to take extra precautions to prevent losses on these shipments. Each trailer was loaded with eighteen pallets, the first two pallets being placed directly against the front wall of each trailer and the other pallets placed snuggly behind them. After loading each trailer, a small

space at the rear was left empty and so two-by-four's were nailed to the floor directly behind the last pallets to brace them. Corrugated cardboard shrouds were placed along the sides of the palletized loads to guard against cans falling out during shipment.

After the loading, however, Transcon did not transport the cans directly to Van Nuys. Instead, the trailers were driven ten miles to defendant's West Memphis, Arkansas terminal. There Transcon employees were directed to unload the cargo and to transfer it to "pup" trailers. The reloading of the cargo was not performed with the same care as the original loading. The cardboard shrouds became detached and many of the pallets loosened. As a result, cans fell off the pallets. In only a few of the "pup" trailers were the pallets braced in any manner at all. In the space at the rear of the trailers, Transcon also added miscellaneous cargo from other shippers. The cans were then transported 1,800 miles to Van Nuys.

Upon arrival at the Schlitz brewery, plaintiff's employees found a great number of loose cans in the trailers. Furthermore, it was, of course, obvious that Transcon had not complied with Schlitz's instructions regarding the use of trailers. All of the cans were eventually transferred to a nearby warehouse and Transcon was notified that Schlitz intended to file a claim for cargo damage. It was subsequently determined that 60,000 cans were dented or crushed. More importantly, the entire load was contaminated with fibers from the chipboard separators. Schlitz's personnel testified that they had never observed a shipment of cans which contained such a large amount of fiber dust. The normal rinsing techniques were ineffective to remove the dust from the cans. For some reason, many of the fibers adhered to the enamel lining in the interior of the cans, thus

rendering them unusable.[2] Schlitz eventually had to sell the cans for scrap and suffered a loss valued at $234,408.42.

At trial the plaintiff presented the *prima facie* case required by the Carmack Amendment. It submitted evidence that the cans were delivered to the carrier in good condition, they arrived at the destination in a damaged condition, and that a specific monetary loss resulted, see *Missouri Pacific Railroad v. Elmore and Stahl*, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964). The trial judge specifically ruled that the plaintiff successfully carried its burden as to the elements of the *prima facie* case and that conclusion is not challenged on appeal. Under the Carmack Amendment, the burden then shifted to the defendant to demonstrate that it was free from negligence and that the damage was caused by (a) an act of God; (b) a public enemy; (c) an act of the shipper; (d) a public authority; or (e) an inherent vice or nature of the goods, see *Martin Imports v. Courier-Newson Express, Inc.*, 580 F.2d 240, 242 (7th Cir. 1978), *cert. den.* 439 U.S. 983, 99 S.Ct. 574, 58 L.Ed.2d 655 (1978), citing *Missouri Pacific Railroad, supra*, 377 U.S. at 137, 84 S.Ct. at 1144. Transcon's defense was that the cans were delivered to it in a defective condition. This was based on the expert testimony of Dr. Vandermeerssche. He stated that in fifty percent of the cans he examined from the Memphis to Van Nuys shipment the enamel coating contained imperfections and bubbles. His theory was that

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[2] There is much discussion in the briefs over whether the problem was the adhesion of chipboard fibers to the enamel or the inability of Schlitz's rinsing techniques to cleanse the cans. This argument is similar to the age-old conundrum, "Which came first, the chicken or the egg?" Schlitz demonstrated that the cans were undamaged in Memphis and it was stipulated that they arrived in Van Nuys in an unusable condition. For purposes of this opinion, further analysis is unnecessary.

the chipboard fibers could not be rinsed out because of the surface tension resulting from the imperfections in the enamel. The plaintiff rebutted this testimony with its experts who testified that the bubbles and unevenness were not related to the adhesion of the chipboard fibers. Furthermore, the fact that the cans were chosen randomly from the one produced in Memphis and that none of the other cans suffered from fiber contamination weighed against Dr. Vandermeerssche's explanation.

In its Findings of Fact the Court rejected Dr. Vandermeerssche's theory because his sampling of the cans was not statistically significant. However, the district court did not accept the plaintiff's theory of the fiber contamination either. Dr. Himmelfarb, plaintiff's expert, testified that the vibration caused by the defendant's unloading and reloading of the cans and its failure properly to brace the pallets generated an excessive amount of the chipboard dust as well as fibers of above-average size. He stated that when the fibers absorbed moisture they would adhere to the enamel lining of the cans. The Court rejected plaintiff's theory, stating simply that "it was speculative and untested." The trial judge concluded that "the reason the fiber dust could not be economically removed from the cans has not been shown."

However, the trial judge did accept two statements of Dr. Vandermeerssche: (l) that fiber dust is generated by any movement of the pallets; and (2) that the number of fiber particles produced would bear a roughly linear relationship to the distance traveled and that beyond some threshold distance the size of the particles would increase. The district judge concluded that the defendant had carried its burden of demonstrating that the damage resulted from the inherent nature of the goods as packaged by Schlitz. He

noted that the plaintiff made the decision to pack the cans with chipboard separators knowing that fiber dust would be generated. The Court concluded:

> To meet its burden of proof, it is not necessary that the defendant prove the exact reason why the chipboard fibers could not be removed from the cans. It is sufficient that the defendant show that the various factors which possibly contributed to the problem were within the control and exclusive knowledge of the shipper, Cf. *Wisconsin Electric Power Co. v. Zallea Bros.*, 606 F.2d 697 (7th Cir. 1979). Based on this reasoning, the district court denied plaintiff relief as to the fiber contaminated cans.

Appellant claims that the trial judge erred in concluding that Transcon had satisfied its burden of demonstrating that it was not negligent and that the inherent nature of the goods was the sole cause of the damage. We must agree.

We begin by noting that it is undisputed that Schlitz satisfactorily presented a *prima facie* case. That showing created a presumption of negligence as to Transcon, *Plough, Inc. v. Mason and Dixon Lines*, 630 F.2d 468 (6th Cir. 1980). Even beyond that presumption there was substantial evidence of negligent conduct on the part of the defendant: the direct disobedience of an instruction from the shipper, the unnecessary unloading and reloading, the lack of bracing of the cargo, and the inclusion of additional cargo. Furthermore, there are relevant areas of inquiry to which the defendant provided no evidence. Transcon offered no testimony of any of the truck drivers as to the treatment of the cargo between West Memphis and Van Nuys. Furthermore, there was no evidence offered as to the

nature of the additional cargo which was put in the rear of the trailers.

The trial court stated: "Except for providing the normal vibrations that result from transportation, Transcon had no control over any of the factors that might have played a role in the contamination problem." However, Transcon provided more than "normal vibrations" as a result of the unnecessary unloading and reloading as well as its failure to brace the loads. Furthermore, it is difficult to accept the conclusion that Transcon had no control over the factors relating to the fiber contamination when the cause of the fiber adhesion was never determined.

We also cannot accept the conclusion that Transcon demonstrated by a preponderance of the evidence that the sole cause of the damage was the inherent vice or nature of the goods. It is undisputed that the use of chipboard separators between layers of cans was standard operating procedure in the industry. Furthermore, none of the experts who testified could recall a fiber adhesion problem ever occurring before to Schlitz or any other shipper. The fact that the rail shipment of cans arrived in satisfactory condition also weighs against the conclusion of an inherent vice. Appellee suggests that there is insufficient evidence to justify a comparison between the two shipments. We disagree. The testimony was uncontroverted that the cans were of the identical type (only the logo was different), were packed in the same manner in pallets with chipboard separators, and traveled the same distance. The only significant distinction is that the cans in the rail shipment were not subjected to unnecessary unloading and reloading and were properly braced. The comparison between the two shipments is rendered even more probative by the fact that the experts unanimously agreed that rail transportation is

more traumatic to the cargo than truck transportation. Appellee argues that there was no testimony regarding the extent of fiber dust generated by that rail shipment. However, it was undisputed that those cans were put into production by Schlitz and the cans shipped by Transcon were stipulated to be unusable upon arrival.

Our conclusion that the district court erred in apply- ing the burden of proof imposed on Transcon by the Carmack Amendment is buttressed by its reliance on *Zallea Bros., supra,* 606 F.2d 697. In that case the plaintiff sued a pipe manufacturer for delivering allegedly defective steam pipes. The complaint alleged various breaches of warranties, strict liability and negligence. The pipes had developed cracks as the result of stress corrosion and, as in this case, neither party could demonstrate the exact cause of the damage because the corrosive agent could not be identified. After a non-jury trial, the district judge ruled for the defendant as to all claims and the judgment was affirmed on appeal. This Court quoted extensively from the trial court's opinion as "an excellent synopsis of the equities in this case:"

> "In he circumstances of this case, imposi- tion of such liability upon Zallea [the defendant] is unwarranted. In this case the situation is such that there simply were no general standards of steam quality and of levels of chemicals or corrodents which Zallea reasonably could have anticipated. The evidence does not support the conclusion that Zallea did have or should have had knowledge of the likelihood of the joint failures sufficient to justify imposing liability upon Zallea. The evidence supports a finding that WEPCO [the plaintiff] was in a position to have superior knowledge of the actual quality and contents of

> its steam, i.e., the levels of chemicals or corrodents in the steam, and to have the expertise and access to knowledge concerning the steam in its pipes. Since there were no general industry standards regarding acceptable steam quality and levels of chemicals or corrodents in light of which Zallea could have designed the expansion joints or issued warnings, and since WEPCO was in a better position to evaluate its own steam quality and chemical or corrodent levels, the loss for the still unexplained failures must fall upon WEPCO rather than Zallea." 606 F.2d at 704 quoting from *Zallea Bros.*, 454 F.Supp. 36, 38 (E.D.Wis. 1978).

Of course, the major distinction between *Zallea Bros.* and this case is that it was a typical civil action in which the burden of proof was on the plaintiff as to all claims. Under the Carmack Amendment the burden was on the defendant Transcon to demonstrate that it had not been negligent and that the damage was caused by an inherent defect in the cargo. Furthermore, as to the equities in this case, Congress considered them when it drafted the legislation and the courts are thereby limited in their analysis of those concerns. Nonetheless, we do not find the equities of this case to be similar to those in *Zallea Bros.* Here, Transcon was clearly negligent in the handling of the cargo. In light of the lack of evidence as to the treatment of the cargo between West Memphis and Van Nuys and the nature of the additional cargo, the inability to prove the casual element cannot be attributed solely to Schlitz. One of the reasons for placing the burden of proof as to negligence on the carrier is that it has the superior, if not the exclusive, means to demonstrate the causal factors, *Galveston, Harrisburg & San Antonio R. Co. v. Wallace*, 223 U.S. 481,

492, 32 S.Ct. 205, 207, 56 L.Ed. 516 (1911). Thus, one court has stated:

> "The phrase 'caused by' in the Amendment has been interpreted to mean that a common carrier is liable for all losses which occurred while the goods were being transported by it, unless the carrier can demonstrate it is free from fault. *United States v. Central of Georgia Railway Co.*, 411 F.Supp. 1023, 1026 (E.D.Tenn. 1976) [Citations omitted.]

Therefore, we conclude that the defendant Transcon did not carry its burden of proof as to negligence or the inherent vice defense. Accordingly, the judgment of the district court is reversed.

APPENDIX B

DECISION

JOS. SCHLITZ BREWING CO., a Wisconsin corporation,

Plaintiff,

vs.

TRANSCON LINES, a California corporation,

Defendant.

No. 80-C 236.

United States District Court,

E. D. Wisconsin

May 31, 1983.

Action was brought against carrier to recover for damages sustained to cargo of empty beer cans. The District Court, Reynolds, Chief Judge, held that carrier was not liable for fiber dust contamination of the shipment where shipper had chosen manner of packaging cans which made certain amount of fiber dust contamination inevitable and where any negligence of carrier in reloading was not proximate cause of contamination, although carrier was liable for physical damage to cans.

Judgment for shipper for cost of damaged, but not contaminated cans.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

REYNOLDS, Chief Judge.

This is an action brought under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707. Plaintiff Jos. Schlitz Brewing Company (Schlitz) seeks to recover for damages sustained to a cargo of empty beer cans transported by the defendant Transcon Lines (Transcon). A court trial was held from March 28 through April 5, 1983. This constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a).

FINDINGS OF FACT

The plaintiff Schlitz was in May of 1977 a corporation organized and existing under the laws of the State of Wisconsin, having its principal place of business at 235 West Galena Street, Milwaukee, Wisconsin. Schlitz was primarily engaged in the business of making beer, and manufactured and distributed a beer labeled "Old Milwaukee". In May 1977, Schlitz produced beer at seven breweries, two of which were located in Memphis, Tennessee, and Van Nuys, California, which is near Los Angeles.

The defendant Transcon is a corporation organized and existing under the laws of the State of California, having its principal place of business at 101 Continental Boulevard, El Segundo, California. Transcon is a common carrier providing motor carrier services subject to the jurisdiction of the Interstate Commerce Commission. Transcon has terminals and offices throughout the United States,

including the Memphis and Los Angeles metropolitan areas.

In May 1977, Schlitz hired Transcon to move approximately 3.1 million empty beer cans with the Old Milwaukee label from Schlitz's Memphis plant to its Van Nuys plant. When the first few loads of cans arrived in Van Nuys, Schlitz employees rejected the shipment. It was discovered that many cans had sustained physical damage either by falling off of the pallets onto which they had been loaded or by otherwise being scratched or dented. However, the main damage was that the entire shipment of cans was contaminated with fibers from the chipboard that separated the layers of cans.

The empty beer cans were produced by a contract plant of American Can Company in Memphis. Although Schlitz Container Division supplied Schlitz breweries with beer cans, Schlitz also obtained cans from outside manufacturers and from contract plants whose output was fed directly into the breweries. The American Can Company plant in Memphis was such a contract plant. The facility was connected to Schlitz's Memphis plant in space leased by Schlitz. The cans were fed by conveyor through a wall directly into Schlitz's plant. Once the cans came through the wall, they either entered the Schlitz production lines immediately or else were loaded onto pallets and warehoused.

Empty cans are loaded onto the pallets by a machine known as the palletizer in the following manner. Each pallet is a wooden ski 44" by 56". The palletizer first places a layer of cans on the pallet with their open ends up and then pieces of chipboard are placed on top of the layer of cans. This process is repeated until there are a total of 18 layers of cans on the pallet. On top of the last piece of chipboard is

placed a wooden frame known as a picture frame. Finally steel bands are run over the top of the palletized load, down the sides, around the bottom, and up the other side. These bands are tightened to hold the load together. Palletized cans would then be removed from the pallets and fed into the production lines of Schlitz's Memphis plant as needed.

As American Can produced the cans, they were sampled and inspected by Schlitz. The cans were checked for correct dimensions and for their appearance. Then two tests were performed to insure that the enamel lining on the inside of the cans was intact and that no metal was exposed. During the period around May 1977, no problems with the enamel lining were apparent.

Empty cans entering the production line were first inspected and then cleaned. The inspection was a simple visual inspection. At the beginning of the line, bunches of cans were funneled into a single file. A worker stationed at the funneling area inspected the cans by looking down into them either directly or through a mirror positioned overhead. Once the cans were funneled into a single file, they were then rinsed with an air jet and then with water, and turned upside down during this process. After the cans were filled, random cans were tested for clarity by holding the contents up to a light. Schlitz never experienced any chipboard fiber contamination of cans used in its Memphis production line.

On May 1, 1977, the Schlitz Container Division employees in California went on strike. To insure an adequate inventory of cans, Schlitz directed the Memphis brewery to ship approximately 3.1 million of its empty Old Milwaukee steel cans to the Van Nuys plant. Ted Thurmon, Schlitz's Inventory Control Coordinator in Memphis, was directed to contact Transcon. Thurmon had two conversations with

Transcon regarding the shipment. In the first telephone conversation, Thurmon indicated that Schlitz wanted the cans to be picked up in 45-foot trailers with swing-out doors. In the second telephone conversation, which took place a day or day and a half before the first trucks were loaded, the Transcon representative asked Thurmon if Schlitz would accept pup trailers (27 or 28-foot trailers). Thurmon advised that the cans had to be picked up on 45-foot trailers with swing-out doors, not roll-up doors. The 45-foot trailers were desired because Schlitz wanted to use only two loading docks to load the trucks, and the swing-out doors were desired to ease the loading of the pallets of cans. At no time did Schlitz indicate to Transcon that shipping the cans in pup trailers would be acceptable.

The pallets that were shipped were chosen at random from those pallets warehoused in Memphis. To prepare the pallets for shipment, Schlitz employees inspected the pallets for dented cans or voids created from cans that had fallen out and substituted new cans. In a few instances, the tension on the load was too much to allow a new can to be slid in. The employees next slid corrugated cardboard shrouds into the sides of the palletized loads between the cans and the side bands. This would further guard against cans falling out during shipment. Shrouds had not typically been used in prior shipments, but because of the size of this shipment, Schlitz had directed that special care be taken to prevent loss of cans during shipment. The corrugated cardboard that was used for shrouding was taken from incoming shipments of bottles on which the corrugated cardboard had been used as shrouding. Finally, the employees taped some of the side corners of the shrouding together.

From May 17 through May 21, 1983, Schlitz employees loaded the 45-foot trailers provided by Transcon with

pallets of cans. Each trailer was loaded with 18 pallets of cans, positioned in two rows of nine pallets each. The pallets loaded first were bunted against the front of the trailer, and then subsequent pallets were bunted up against each other and the side of the trailer. This left a couple of inches between each row of pallets of cans, and about three feet at the back of the trailer. The employees nailed two-by-four inch boards to the floor immediately behind the last pallets to brace them. While a single two-by-four brace is usually used in shipping empty cans, two two-by-four braces were used for this shipment. No bracing was placed in the middle of the trailer. A total of 24 45-foot trailers were loaded in this manner. Each trailer held 129,276 cans, so that the total shipment consisted of 3,102,624 cans. Transcon issued 24 bills of lading to Schlitz for the shipment.

Transcon conveyed each trailer to its terminal in West Memphis, Arkansas, located approximately ten miles from the Schlitz Memphis brewery. There, Transcon personnel unloaded each 45-foot trailer and transferred the pallets onto 27-foot or 28-foot pup trailers. Some of these pup trailers had a flat front, so the pallets were simply bunted up against the front of these trailers. Other pup trailers had a wedged-shape nose at the front. In loading these trailers, Transcon personnel first loaded two pallets side-by-side into the center of the nose. Thus there was a void area in the very tip of the noses. The remaining pallets were then bunted up against these two front pallets, forming two rows along the sides of the trailers. Each pup trailer except for one or two held 10 pallets of cans.

During the transfer of the cans, the Transcon personnel noticed that a number of cans had fallen out of the pallets. To reduce the amount of further loss, the Transcon personnel recoopered the palletized loads. They did this

principally by adding tape to hold the pallets together better, although in some cases they added to the shrouding that Schlitz employees had put on the pallets.

In the space at the back of the pup trailers behind the loaded pallets, Transcon added cargo from other shippers that was destined for Los Angeles. In some cases, a sheet of plywood was put up against the last pallets to separate them from the additional cargo, generally when the additional cargo extended above the top of the pallets. In only a few cases did Transcon personnel brace the pallets by nailing two-by-four inch boards to the floor immediately behind the last pallets.

The journey from Memphis to Los Angeles was about 1,800 miles long. This was an unusually long distance for Schlitz to transport empty cans by truck. The next longest shipment of empty cans by truck was a 1,100 mile trip from Memphis to New York. Typically, for such long distance transportation, Schlitz had transported empty cans by rail.

Transcon's city drivers delivered the first few pup trailerloads to Schlitz's Van Nuys brewery. When Schlitz employees opened the doors to the trailers, they found a large number of loose cans on the trailer floors and a number of pallets that had virtually disintegrated. It was apparent that a great deal of cans had suffered damage. Because of the deterioration of the pallets, it was impossible to unload the trailers without further damage. In the first few trailerloads that were delivered, Schlitz employees did not observe any bracing of the pallets. Transcon was relieved of delivering the remaining trailerloads to the Van Nuys brewery and the damaged loads were placed in a warehouse.

Although approximately 60,000 cans sustained physical damage or fell out of the pallets, a greater problem was that

the inside of the cans had been contaminated with a film of chipboard fibers. Although Schlitz tried to remove the fibers, it was unable to do so. This rendered the entire shipment unusable. Total damages for loss of the shipment came to $234,408.42. Excluding cans that were damaged only by fiber dust contamination, the damages came to $3,000.

Although certain facts regarding the contamination were agreed upon by the parties, neither the defendant nor the plaintiff could adequately explain why the fibers that fell into these cans could not be rinsed out so as to make the cans usable. The parties stipulated that the cans were not usable as delivered because of the fibers. Further, it is undisputed that the source of the contamination was the chipboard used to separate layers of cans on the pallets, and that the fiber dust resulted from friction between the open tops of the cans and the chipboard separators as they vibrated during transportation. The parties' dispute was over why the fibers could not be adequately rinsed out of the cans so as to make them usable.

The defendant's theory was that a problem with the enamel lining in the cans made removal of the fibers difficult. Defendant supported this theory primarily with the testimony of Dr. Gaston Vandermeerssche. Dr. Vandermeerssche testified that he examined certain cans taken from one of the pallets. He found that in about 50 percent of the cans, the enamel coating on the inside contained imbedded particles and bubbles. These steel cans were composed of two pieces, the bottom and side, that were put together with a double seam. This differed from extruded aluminum cans where the side and bottom are one piece. Dr. Vandermeerssche testified that in his opinion, the fibers would not rinse out because they were held in place

by the surface tension resulting from the imperfections in the enamel coating and the close surfaces in the bottom seam of the steel cans. Dr. Vandermeerssche also testified that varying temperatures and humidities encountered as the cans were shipped would result in the fibers sticking to the cans.

The plaintiff's theory was that the defendant's handling of the cans during shipment generated an excessive amount of fiber dust and especially large fibers, and that this made removal of the fibers difficult. Dr. Philip Himmelfarb testified that when such fibers absorbed moisture, they would swell and become lodged in the bottom seam of the cans. He also testified that he had never before seen a shipment of cans arrive containing the size and quantity of fiber particles observed in the shipment carried by Transcon.

The Court finds neither theory persuasive. Dr. Vandermeerssche's observations regarding the enamel coating are based on a small sample of cans taken from one pallet. Since they were taken from one pallet, the cans would have been coated at about the same time. Because many variables affect the quality of the coating, the quality of coatings on one pallet indicates little about the quality of coatings on another pallet. Dr. Vandermeerssche's sample was not a statistically relevant sample. The Court similarly finds that the reason the fiber dust could not be economically removed from the cans has not been shown.

Finally, the Court finds that Schlitz knew that shipment of materials with chipboard or cardboard separators generated fiber dust contamination. Schlitz hired Dr. Vandermeerssche to investigate what could be done to eliminate fiber dust contamination of its final product, and his research indicated that fiber dust is always generated by

shipping materials with chipboard or cardboard separators. Schlitz was unconcerned with contamination of its empty cans and bottles because it believed the rinsing process was adequate to remove any contamination of the containers prior to filling. This had been Schlitz's experience. The Court accepts Dr. Vandermeerssche's conclusion that fiber dust is generated by any movement of the pallets.

Dr. Vandermeerssche's research on shipments of the final product indicated a roughly linear relationship between the number of fiber particles generated and the distance traveled. It also indicated that after traveling a certain distance, approximately 400 miles in the case of filled cans, the size of the particles generated would increase. Dr. Vandermeerssche opined that the same would be true in shipment of empty cans, although the threshold would not necessarily be 400 miles and the number of particles produced by traveling a certain distance may be different. The Court accepts Dr. Vandermeerssche's conclusion that the number of fiber particles produced would be ar a roughly linear relationship to the distance traveled and that after traveling beyond some threshold distance the size of the particles would increase.

CONCLUSIONS OF LAW

[1] A shipper makes out a prima facie case under the Carmack Amendment when he shows delivery in good condition, arrival in damaged condition, and the amount of the damages. *Missouri Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 138, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194 (1964). The Court holds that Schlitz has made out a prima facie case. The pallets that were transported were randomly chosen from the pallets in the Memphis warehouse. The testimony indicates that the remaining pallets were used

without any problems of fiber contamination appearing. This created an inference that the shipped cans were also in good condition. The defendant has failed to overcome this inference by claiming that the unshipped cans were not subjected to the same tests as those that were shipped. There was no dispute that the cans arrived with chipboard fibers in them which made them unusable nor was there any issue over the amount of damages the plaintiff sustained.

[2,3] Once the plaintiff shipper makes out its prima facie case, the carrier's defenses are limited. Although the carrier is not an absolute insurer, the carrier is liable for the damage to the transported goods "unless it can show that the damage was caused by '(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods.' " *Martin Imports v. Courier-Newsom Express, Inc.*, 580 F.2d 240, 242 (7th Cir.) (quoting *Missouri Pacific Railroad*, 377 U.S. at 137, 84 S.Ct. at 1144), cert. denied 439 U.S. 983, 99 S.Ct. 574, 58 L.Ed.2d 655 (1978). The burden of proof is on the carrier to show both that the carrier was free from negligence and that the damage to the cargo was due to one of the excepted causes listed above. *Id.* The carrier has failed to meet its burden with respect to the $3,000 in physically damaged cans but that the carrier has met its burden with respect to the fiber dust contamination.

[4] A carrier is liable for cargo damage even when that damage was caused by improper packaging or improper loading by the shipper unless the defect is latent and not discoverable through ordinary observation. See *Minneapolis, St. Paul & Sault Ste. Marie Railroad v. Metal-Matic, Inc.*, 323 F.2d 903, 906-07 (8th Cir. 1963); *Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island and Pacific Railroad*, 297 F.2d 176,

178 (7th Cir. 1961); *Eastern Motor Express, Inc. v. A. Maschmeijer, Jr., Inc.*, 247 F.2d 826, 828-29 (2d Cir. 1957), *cert.* denied 355 U.S. 959, 78 S.Ct. 535, 2 L.Ed.2d 534 (1958). The risk that the cans might fall off of the pallets should have been apparent to Transcon at the time they picked up the loads. It certainly became apparent to Transcon when they transferred the pallets to pup trailers, since at that time the Transcon employees noticed cans falling off of the pallets and so they recoopered a number of pallets. Because the packaging defects were patent, Transcon remains liable under the Carmack Amendment for physical damage to the cans.

[5] Transcon cannot be held liable for the fiber dust contamination. On such a long journey, the manner in which the cans were packaged on the pallets made a certain amount of fiber dust contamination inevitable. Schlitz chose to use chipboard to separate the layers of cans, not Transcon. The manner of packaging the cans, i.e., palletizing them with chipboard separators, was under Schlitz's exclusive control. Additionally, Schlitz knew that fiber dust was generated during such shipments, although they were not concerned about contamination of empty containers because rinsing had always ben adequate to remove any contamination.

Transcon had no reason to know of the potential contamination problem. The defect in the packaging that resulted in the contamination was latent, not patent. Although it was foreseeable that failure to properly brace the loads would lead to physical damage to the cans, it was not foreseeable to Transcon that the shipper would pack the cargo with material that could contaminate the cargo. The fiber contamination was gen- erated by normal vibrations encountered through transportation, and Transcon could

have done nothing to prevent the contamination Because the fiber dust would have been generated even if Transcon never transferred the pallets to pup trailers, any negligence in reloading the pallets onto the pup trailers was not the proximate cause of the fiber dust contamination.

The real problem in this case was that the fiber dust could not be rinsed out, and neither party could adequately explain why that occurred. Nonetheless, the Court holds that the defendant has met its burden of showing that the damage resulted from the inherent nature of the goods as packaged by the shipper. Except for providing the normal vibrations that result from transportation, Transcon had no control over any of the factors that might have played a role in the contamination problem. Schlitz did in that it placed chipboards over the open sharp end of its cans. To meet its burden of proof, it is not necessary that the defendant prove the exact reason why the chipboard fibers could not be removed from the cans. It is sufficient that the defendant show that the various factors which possibly contributed to the problem were within the control and exclusive knowledge of the shipper. Cf. *Wisconsin Electric Power Company v. Zallea Bros.*, 606 F.2d 697 (7th Cir. 1979).

THEREFORE, IT IS ORDERED that judgment shall be entered providing that the plaintiff shall recover of the defendant the sum of $3,000 plus costs.

APPENDIX C

No. 83-2196

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 8, 1985
Before
Hon. Richard A. Posner,
Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. William J. Campbell,
Senior District Judge*

JOS. SCHLITZ BREWING CO.,
a Wisconsin corporation,

Plaintiff-Appellant,

vs.

TRANSCON LINES, a California corporation,

Defendant-Appellee.

Appeal from the United States
District Court for the Eastern
District of Wisconsin
Honorable John W. Reynolds, Judge
No. 80 C 236

ORDER

On April 3, 1985, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

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* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

APPENDIX D

Federal Rules of Civil Procedure
Rule 52(a)

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgmentshall beentered pursuant to Rule 58; and in granting or refusing interlocutoryinjunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that thecourt adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

49 USC § 20(11)

(11) Liability of initial and delivering carrier for loss; Limitation of liability; Notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . .

49 USC § 11707

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title [49 USC §§ 10501 et seq., 10521 et seq., or 10561 et seq.] shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV [49 USC §§ 10501 et seq., 10521 et seq., or 10561 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies

to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title [49 USC §§ 10761 et seq.]. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICE OF WISCONSIN

JOS. SCHLITZ BREWING CO.,
a Wisconsin corporation,

Plaintiff,

vs.

TRANSCON LINES, a California corporation,

Defendant.

COMPLAINT

[Jury Trial Demended]

Nowcomes the plaintiff by FRIEBERT & FINERTY, its attorneys, and alleges as follows:

JURISDICTIONAL STATEMENT AND PARTIES

1. This [is] an action under the Interstate Commerce Act, 49 U.S.C. §§ 20(11) and 319, revised and codified by P.L. 95-473, 92 Stat. 1337 (October 17, 1978) as 49 U.S.C. § 11707, of which this Court has jurisdiction under 28 U.S.C. § 1337, as hereinafter more fully appears. The action also arises under the Court's diversity jurisdiction, 28 U.S.C. § 1332(a), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. The plaintiff is a corporation organized and existing under the laws of the State of Wisconsin having its

principal place of business at 235 West Galena Street, Milwaukee, Wisconsin, and is engaged in the business, among others, of making beer.

3 The defendant is a corporation organized and existing under the laws of the State of California having its principal place of business at 101 Continental Boulevard, El Segundo, California, and is a common carrier providing services subject to the jurisdiction of the Interstate Commerce Commission. The defendant operates a route through the federal judicial district of the Eastern District of Wisconsin.

FIRST CLAIM FOR RELIEF:

ACTION FOR DAMAGE TO CARGO UNDER 49 U.S.C. § 11707

4. On or about May 17, 1977, the plaintiff placed shipping orders with the defendant for 24 High-Cube 45 foot trailers for an inter-company transfer of a quantity of empty three-piece beer cans from the plaintiff's plant in Memphis, Tennessee to its plant in Van Nuys, California, at the governing published tariff rate.

5. On or about May 17 to May 21, 1977 the defendant provided 24 High-Cube 45 foot trailers at the plaintiff's loading dock in Memphis, Tennessee and the plaintiff loaded into the trailers and delivered to the defendant 3,102,624 beer cans, in good condition.

6. The defendant issued shipper-provided bills of lading to the plaintiff for each of the 24 trailer loads. Each of the bills of lading named the defendant as the singleline carrier. Each bill of lading was marked by defendant as being a clear delivery receipt. Copies of said bills of lading are annexed hereto and incorporated herein by reference.

7. After issuing the bills of lading for the 24 trailer loads, the defendant, without the knowledge or consent of the plaintiff, and contrary to the bills of lading and the agreement of the parties, transloaded all 24 trailer loads at West Memphis, Arkansas by reloading the beer cans into 38, 27 foot trailers and, in this manner, transported the beer cans to Van Nuys, California.

8. At the time of the defendant's delivery of the beer cans to the plaintiff in Van Nuys, California, the beer cans were found to be in a damaged and contaminated condition, rendering them unacceptable and unsuitable for use as containers for food products, to the plaintiff's damage in the amount of $ 50,000.

9. The plaintiff has performed all of the conditions required of it by the bills of lading.

10. On January 13, 1978, within nine months of the accrual of the plaintiff's claim, the plaintiff filed a loss and damage claim against the defendant with respect to the damaged and contaminated beer cans described above. On March 9, 1978 the defendant denied the plaintiff's claim. The instant action is filed within two years of receipt of such denial, in accordance with 49 U.S.C. § 11707(e).

SECOND CLAIM FOR RELIEF: NEGLIGENCE

11. All of the foregoing allegations of the complaint are incorporated herein by reference.

12. The defendant's delivery of the beer cans in a damaged and contaminated condition, after having received them in good condition, constitutes common law negligence, as a result of which the plaintiff sustained damage in the amount of $350,000.

THIRD CLAIM FOR RELIEF: CONTRACT

13. Paragraphs 1 through 10 are incorporated herein by reference.

14. On or about May 17, 1977, the plaintiff and the defendant entered into an agreement whereby the defendant promised to transport 3,102,624 of the plaintiff's beer cans in 24 High-Cube 45 foot trailer loads from the plaintiff's plant in Memphis, Tennessee to the plaintiff's plant in Van Nuys, California and the plaintiff agreed to and thereafter did pay a freight charge of $1,424 per trailer load.

15. The defendant thereafter breached the agreement by transporting the beer cans in 27 foot trailers and by delivering the beer cans to the plaintiff in Van Nuys, California in a damaged and contaminated condition, rendering them unacceptable and unsuitable for use as containers for food products.

16. As a result of the defendant's breach of contract as described above, the plaintiff's entire shipment of 3,102,624 cans was damaged and contaminated and the plaintiff incurred warehouse costs, freight charges, labor charges and accessorial charges, all to its damage in the amount of $350,000.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $350,000, with costs and disbursements.

Dated at Milwaukee, Wisconsin this 6th day of March, 1980.

FRIEBERT & FINERTY

By_____
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Supreme Court, U.S.
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No. 85-176

In The
Supreme Court of the United States
October Term, 1985

TRANSCON LINES, INC.,
Petitioner,

v.

JOS. SCHLITZ BREWING CO.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When a shipper makes out a *prima facie* case under the Carmack Amendment by proving that its cargo was in good condition when tendered to the carrier, that the cargo arrived damaged, and the amount of the loss, and the carrier fails to prove the cause of the cargo damage (and therefore its freedom from any contribution to that cause), who prevails?

During the course of this litigation, respondent Jos. Schlitz Brewing Company was acquired by and merged into The Stroh Brewery Company. The Stroh Brewery Company is owned by The Stroh Companies, Inc. There are no subsidiaries that are not wholly owned by The Stroh Companies, Inc.

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INTRODUCTION

The respondent, Jos. Schlitz Brewing Company, requests that the Court deny the petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered on March 20, 1985, because the decision below does not conflict with any decision of this Court or of any federal court of appeals and there are no other special and important reasons for granting the writ. Supreme Court Rule 17.1.

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OPINIONS BELOW

Respondent accepts Petitioner's statement of the opinions below.

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JURISDICTION

The respondent agrees with the statement of jurisdictional grounds set forth in the petition for writ of certiorari.

———o———

STATUTES INVOLVED

Respondent agrees with the Petitioner's identification of the statutes involved.

———o———

COUNTERSTATEMENT OF THE CASE

This is a cargo damage case under the Carmack Amendment of 1906 to the Interstate Commerce Act, § 20 (11) of the Act, recodified at 49 U.S.C. § 11707. In *Missouri & Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 138 (1964), the Court held that the Carmack Amendment allocates the burden of proof in cargo damage litigation as follows:

> [U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

At the bench trial in this case, the trial court found that the respondent Jos. Schlitz Brewing Co. ("the Shipper") established delivery in good condition by proof that the cargo in question—empty beer cans—was picked randomly from a Memphis warehouse full of cans, the remainder of which were usable. Arrival in damaged condition was proved when the carrier stipulated during trial that the cans were unusable upon arrival at the shipper's Van Nuys, California brewery and had to be destroyed. The amount of loss—$234,408.32—was also proved by stipulation.

The District Court accordingly concluded that the respondent shipper carried its burden to prove a *prima facie* case under the Carmack Amendment. The trial court identified the disputed issue at trial to be "why the fibers could

not be adequately rinsed out of the cans so as to make them usable." Pet. App. B-8; 571 F. Supp. at 55. The trial court reviewed the theories offered by each side's expert, found neither theory persuasive, and found that "the reason the fiber dust could not be economically removed from the cans has not been shown." Pet. App. B-9; 571 F. Supp. at 56. Nevertheless, the trial court, relying upon common law negligence and commercial law principles, rather than the special burden-of-proof allocation mandated by this Court in *Elmore & Stahl*, concluded that the carrier should not be held liable because "the various factors which possibly contributed to the problem were within the control and exclusive knowledge of the shipper, *cf. Wisconsin Electric Power Company v. Zallea Bros., Inc.*, 606 F.2d 697 (7th Cir. 1979)." Pet. App. B-13; 571 F. Supp. at 58.

On appeal, the shipper argued that the trial court failed to apply the Carmack Amendment to its findings of fact. In a straight-forward application of *Elmore & Stahl* and *Galveston, Harrisburg and San Antonio R. Co. v. Wallace*, 223 U.S. 481 (1911), the Court of Appeals reversed. Pet. App. A-1; 757 F.2d 171.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Represents A Routine Application Of This Court's Holding In Missouri & Pacific Railroad v. Elmore & Stahl, Rather Than A Conflict With That Case.

Petitioner has failed to demonstrate the existence of "special and important reasons" justifying review of the Court of Appeals' decision. Supreme Court Rule 17.1. In

an effort to fit this case within one of the narrow categories of cases for certiorari review, the carrier brazenly declares that the decision below conflicts with this Court's seminal case of *Elmore & Stahl* and with cases decided by every other court of appeals, including prior Seventh Circuit cases. In making this remarkable assertion, the carrier does not point to any language in the decision below expressly departing from *Elmore & Stahl*. Indeed, the decision below specifically relied upon *Elmore & Stahl* in reversing the trial court, which had resolved the case in the carrier's favor by resorting improperly to a non-Carmack Amendment case, *Wisconsin Electric Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697 (7th Cir. 1979), *affirming*, 454 F. Supp. 36 (E.D. Wis. 1978). The carrier's real quarrel is with the *Elmore & Stahl* rule itself, which it asks the Court to abandon in its fourth question presented for review.

Furthermore, the petitioner proclaims a split in the circuits by a string citation in footnote 2 of its petition, without any analysis whatsoever to explain the alleged split.[1] Aside from the footnote, no court of appeals decision is discussed or mentioned in the petition.

The carrier's argument under its heading "A" (labeled "herein of 'good condition' v. 'bad condition'") contends that the shipper should have been required as part

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[1]It is noteworthy that the case cited from the Sixth Circuit held in favor of the shipper on remarkably similar facts. *Plough, Inc. v. The Mason and Dixon Lines*, 630 F.2d 468 (6th Cir. 1980)

of its *prima facie* case to prove that at the time it tendered the cans to the carrier, the cans were "1,800-mile rinseable".

This argument has two fatal defects. First, because its premise is that the shipper failed to prove delivery in good condition (i.e. "1,800-mile rinseable"), it challenges the District Court's finding that the shipper proved its *prima facie* case. Pet. App. B-10; 571 F.Supp. at 56. The Court of Appeals agreed that the shipper had met this burden, and noted that this "conclusion is not challenged on appeal." Pet. App. A-5; 757 F.2d at 173; *see also* Pet. App. A-7; 757 F.2d at 174 ("We begin by noting that it is undisputed that Schlitz satisfactorily presented a *prima facie* case.") It is far too late for the carrier to raise this issue.

Second, it reverses the burden of proof as laid down in *Elmore & Stahl*. *Elmore & Stahl* requires a shipper to prove that the cargo was undamaged when delivered; not that the cargo was in a condition capable of withstanding the rigors of the trip. For example, a shipper suing for cargo damage to a fragile vase transported from Memphis to Los Angeles by common carrier need only prove that it was undamaged when tendered, not that it was strong enough to survive the trip (i.e., to use the carrier's phraseology "1,800-mile non-breakable"). Similarly, just as the shipper in *Elmore & Stahl* had no obligation to prove that its melons were "Texas to Illinois non-spoilable" at the time of tender to the carrier, the shipper in the case at bar had no obligation to prove that its beer cans were "1,800-mile rinseable" when tendered to the carrier.

The carrier accuses the Court of Appeals of committing error on a second ground; for finding in the shipper's favor despite what the carrier claims to be a mere "metaphysical" defect in the cargo. This argument is another attack upon the trial court's conclusion that the shipper proved a *prima facie* case. Here, the carrier argues that the shipper never proved that the cargo was really damaged upon arrival in California. However, the carrier stipulated during the trial that the cans were unusable upon delivery and this stipulation was accepted by the trial court (Pet. App. 8; 571 F. Supp. at 55) and noted by the Court of Appeals.[2] (Pet. App. A-5; 757 F.2d at 173) The Court of Appeals also agreed with the District Court that the shipper proved a *prima facie* case and noted that the carrier did not challenge that conclusion on appeal. Pet. App. A-5; 757 F.2d at 173. The carrier should not be permitted at this stage to back off from its stipulation or to challenge the conclusion of the trial court that the shipper proved a *prima facie* case.

The carrier next accuses the Court of Appeals of committing error by finding the carrier liable allegedly on the basis of "unrelated negligence". To call the carrier's negligent acts "unrelated", however, begs the legal question. The carrier is essentially arguing that the shipper had the burden to prove the mechanism that caused the particles to be retained in the cans. This argument stands the Carmack Amendment on its head. Once a *prima facie* case is made,

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[2]As a result of the stipulation, numerous witnesses from the Van Nuys, California brewery who were prepared to travel to Milwaukee, were called off.

> ". . . the law casts upon [the carrier] the burden of the loss which [it] cannot explain or, explaining, bring within the exceptional case in which it is relieved from liability." *Elmore & Stahl,* 377 U.S. at 143-144, *quoting Schnell v. The Vallescura,* 293 U.S. 296, 304 (1934).

Here, the carrier had the burden to explain what mechanism caused the contaminating particles to adhere to the cans. Unless it proved this mechanism, it could not show that the only factors which caused the adherence were a result of one of the common law exceptions to carrier liability. This is what the Court of Appeals was referring to when it stated:

> "Furthermore, it is difficult to accept the conclusion that Transcon had no control over the factors relating to the fiber contamination when the cause of the fiber adhesion was never determined." 757 F.2d at 174.

The carrier suggests only two reasons why the particles might adhere—road grime or diesel smoke—and concedes it would be liable had either reason been the cause of the particle retention. (Pet. p. 8). But there could have been an infinite number of reasons—beyond road grime or diesel smoke—that caused the problem. There might have been chemical, electrical or other physical mechanisms involved. It was the carrier's burden to prove the mechanism and then to show that such mechanism had its sole source in one of the common law exceptions to carrier liability.

The carrier understood and attempted to meet this burden at trial, but failed. The carrier attempted to prove that the mechanism was defective enamel linings in the interior of the cans, a cause that would have constituted either shipper fault or inherent vice, but the trial court

rejected the theory as unpersuasive. Pet. App. B-9; 571 F. Supp. at 56. The carrier offered no other proof to show the cause of the fiber retention. Hence, the carrier's proof hardly exhausted the various possible causes. The only reason why we have a "mysterious" or "metaphysical" cargo damage is because the carrier failed in its burden of proof. Having thus failed, the Court of Appeals reached the correct conclusion of law that the Carmack Amendment imposes liability on the carrier.

Finally, the carrier asks the Court to grant certiorari to reexamine its holding in *Elmore & Stahl,* an argument never presented to the courts below. The carrier has pointed to no difficulties in the judicial administration of litigation under the Carmack Amendment occasioned by the *Elmore & Stahl* rule over the past twenty-one years,[3] nor to any unfairness to the common carrier industry generally. The argument that the burden of proof should be on the shipper to prove freedom from negligence where the damage is caused by an agency as to which it is claimed that the shipper has superior knowledge was rejected in *Elmore & Stahl* in reasoning that remains as forceful today:

> "Since this argument amounts to a suggestion that we now carve out an exception to an unquestioned rule of long standing upon which both shippers and carriers rely, and which is reflected in the freight rates set by the carrier, the petitioner must sustain a heavy burden of persuasion." 377 U.S. at 143.

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[3]Indeed, the premise of the carrier's lead-off argument is that all of the Courts of Appeals are in agreement concerning the rules in cargo damage litigation.

The carrier has fallen far short of meeting its heavy burden of persuasion that the long standing rules of cargo damage litigation should be reexamined.

II. The Court of Appeals Did Not Overturn Any Of The District Court's Findings Of Fact.

The carrier's second major attack on the Court of Appeals' decision charges that it substituted its own findings on the issue of carrier negligence for those of the trial court, in violation of Rule 52, Federal Rules of Civil Procedure, and this Court's recent decision in *Anderson v. City of Bessemer,* 105 S. Ct. 1504 (1985).

However, none of the Court of Appeals' statements are inconsistent with the District Court's findings. The Court of Appeals merely disagreed with the conclusions of law reached by the District Court about the significance, under the Carmack Amendment, of certain undisputed facts. The Court of Appeals correctly decided, on the basis of undisputed facts, that it is impossible to conclude that the evidence of carrier negligence (e.g. unnecessary unloading and reloading of the cargo, the lack of bracing, and the inclusion of unidentified cargo in the reloaded shorter-length trailers) bore no relationship to the fiber dust retention problem when the cause of that problem was never explained.

The trial court's statements with which the Court of Appeals disagreed appear under the heading "Conclusions of Law" in the trial court's opinion (Pet. App. B-10; 571 F. Supp. at 56) and that is precisely what these erroneous statements were, legal conclusions, not findings of fact. Of course, it is entirely within the province of an

appellate court to review and disagree with a District Court's conclusions of law.

RELIEF SOUGHT

WHEREFORE for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: August 27, 1985.

Respectfully submitted,

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